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No. 07-1015

IN THE

Supreme Court of the United States

JOHN D. ASHCROFT, former Attorney General of the United States, and ROBERT MUELLER, Director of the Federal Bureau of Investigation,

Petitioners,

v.

JAVAID IQBAL,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DENNIS HASTY AS RESPONDENT SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly committed by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials.

PARTIES TO THE PROCEEDINGS

In addition to the parties identified in the caption, six individuals were parties in the Court of Appeals. Each was a defendant in the district court and an appellant in the Court of Appeals. They are Dennis Hasty, former Warden of the Metropolitan Detention Center; Michael Cooksey, former Assistant Director for Correctional Programs of the Bureau of Prisons; David Rardin, former Director of the Northeast Region of the Federal Bureau of Prisons; Michael Rolince, former Chief of the Federal Bureau of Investigation's International Terrorism Operations Section, Counterterrorism Division; Kathleen Hawk Sawyer, former Director of the Federal Bureau of Prisons; and Kenneth Maxwell, former Assistant Special Agent in Charge, New York Field Office, Federal Bureau of Investigation.

Hasty filed a petition for certiorari in No. 07-827, and Cooksey, Rardin, and Hawk Sawyer filed a petition for certiorari in No. 07-1150, both of which are pending.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. A *BIVENS* PLAINTIFF SHOULD NOT BE ABLE TO DEFEAT A FEDERAL SUPERVISORY OFFICIAL'S CLAIM TO QUALIFIED IMMUNITY BASED ON CONCLUSORY ALLEGATIONS. RATHER, THE PLAINTIFF MUST ASSERT SPECIFIC FACTS DEMONSTRATING THE OFFICIAL'S INVOLVEMENT IN THE ALLEGED VIOLATIONS	7
A. This Court Has Long Sought To Preserve a Federal Official's Right to Qualified Immunity By Fashioning Special Rules Applicable to *Bivens* Cases Intended to Resolve Meritless Cases At the Earliest Possible Stage In Litigation	7
B. *Twombly* Requires That A Complaint Allege Facts, Not Legal Conclusions, Demonstrating That The Plaintiff's Claim For Relief Is Plausible	12

TABLE OF CONTENTS—Continued

Page

C. The Teachings Of *Twombly* Underscore The Need For Specific Factual Allegations In *Bivens* Complaints 14

D. The Second Circuit Misapplied *Twombly's* Plausibility Standard..... 16

II. CONSTRUCTIVE KNOWLEDGE IS NOT A PROPER BASIS FOR IMPUTING LIABILITY TO A SUPERVISORY OFFICIAL FOR THE ACTS OF HIS SUBORDINATES 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES Page

Anderson v. Creighton, 483 U.S. 635 (1987) 8, 9, 12, 15
Baker v. Monroe Twp., 50 F.3d 1186 (3d Cir. 1995) 26
Bell Atl. Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955 (2007) ..... *passim*
Behrens v. Pelletier, 516 U.S. 299 (1996) 9, 15
Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) 7
Bd. of County Comm'rs v. Brown, 520 U.S. 397 (1997) 25
Conley v. Gibson, 355 U.S. 41 (1957) 12, 13
Crawford-El v. Britton, 523 U.S. 574 (1998) ..... *passim*
Elmaghraby v. Ashcroft, 04-CV-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) 1
Erickson v. Pardus, ___ U.S. ___, 127 S. Ct. 2197 (2007) 15
Farmer v. Brennan, 511 U.S. 825 (1994) 25
Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997) 26
Green v. Warden, U.S. Penitentiary, 699 F.2d 364 (7th Cir. 1983) 11
Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 2
Harlow v. Fitzgerald, 457 U.S. 800 (1982) . *passim*
Hartman v. Moore, 547 U.S. 250 (2006) 15
Hunter v. Bryant, 502 U.S. 224 (1991) 8
Int'l Action Ctr. v. United States, 365 F.3d 20 (D.C. Cir. 2004) 22, 25
Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) ..... *passim*
Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246 (2d Cir. 2001) 19

TABLE OF AUTHORITIES—Continued

Page

Mitchell v. Forsyth, 472 U.S. 511 (1985) ....*passim*
Monell v. Dept. of Soc. Servs. of City of New York, 436 U.S. 658 (1978)..... 22, 24
Poe v. Leonard, 282 F.3d 123 (2d Cir. 2002)..... 22
Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)..... 8
Rizzo v. Goode, 423 U.S. 362 (1976) 25
Robbins v. State of Okla., 519 F.3d 1242 (10th Cir. 2008)..... 15
Saucier v. Katz, 533 U.S. 194 (2001) 8
Scott v. Harris, ___ U.S. ___, 127 S. Ct. 1769 (2007)..... 8
Siegert v. Gilley, 500 U.S. 226 (1991) 8, 9
Williams v. Smith, 781 F.2d 319 (2d Cir. 1986)..... 18
Woodward v. City of Worland, 977 F.2d 1392 (10th Cir. 1992)..... 26
Woodford v. Ngo, 548 U.S. 81 (2006)..... 10

STATUTES AND RULES

28 U.S.C. § 1254(1)..... 2
42 U.S.C. § 1983 .....15, 22, 25
42 U.S.C. § 1985(3)..... 19
Fed. R. Civ P. 8 .....*passim*

MISCELLANEOUS

Report of the Office of Inspector General entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" (April 2003) 2, 3, 21, 23

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at *Iqbal v. Hasty*, 490 F.3d 143 (2007) (reprinted in the appendix to petitioners' petition for a writ of certiorari ("App.") 1a-70a). The order of the district court dismissing some, but not all, of the claims is unreported, but is available as *Elmaghraby v. Ashcroft,* 04-CV-1809, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005) (App. 71a-150a).

JURISDICTION

The Court of Appeals entered its opinion and judgment on June 14, 2007 and denied rehearing on September 18, 2007 (App. 151a-152a). On December 7, 2007, Justice Ginsburg extended the petitioners' time within which to file a petition for a writ of certiorari to January 16, 2008. On January 4, 2008, Justice Ginsburg further extended that time to February 6, 2008, and the petitioners' petition was filed on that date. The petition was granted on June 16, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Although Dennis Hasty, as a respondent in support of petitioners Ashcroft and Mueller, agrees with the statement of the case as framed by petitioners, we briefly summarize the case in order to put the matter into context as to respondent Hasty. Following the terrorist attacks of September 11, 2001, "Congress passed a resolution authorizing the President to 'use all necessary and appropriate force . . . to prevent any future acts of international terrorism against the United States . . . .'" *Hamdi v. Rumsfeld,* 542 U.S. 507, 510 (2004) (quoting Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)). As a result of this enactment, then-Attorney General Ashcroft issued a Directive for federal law enforcement officials "to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'" *See* Report of the Office of Inspector General entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks"

("OIG Report") at 1, available at http://www.fas.org/irp/agency/doj/oig/detainees.pdf.

In the course of executing that order, federal officials arrested and detained over 700 aliens for violating immigration laws, approximately 60 percent of whom were arrested in the New York City area. *Id.* at 111. Many of those arrested in the New York area "and deemed by the FBI to be of 'high interest' to its terrorism investigation" were sent to the Metropolitan Detention Center ("MDC") in Brooklyn, New York, where respondent Hasty was warden, until their status could be assessed. *Id.* Among those arrested was respondent Javaid Iqbal, a citizen of Pakistan. Iqbal asserts that he was arrested and detained on November 2, 2001 by agents of the Immigration and Naturalization Service ("INS") and the Federal Bureau of Investigation ("FBI"). He asserts further that he was held at the MDC until his deportation on or about January 15, 2003. *See* First Amended Complaint ("Compl.") at ¶¶ 9, 80; App. 157a, 169a. Iqbal does not deny that he was in the United States in violation of federal law.

Because the FBI determined who would go to the MDC but provided little information about the detainees including what specific threats they posed, the Bureau of Prisons' ("BOP") headquarters decided early on, for security reasons, to impose special conditions on the detainees. For example, they were housed in the Administrative Maximum ("ADMAX") Special Housing Unit ("SHU") at the MDC, *see* OIG Report at 19, and initially were subject to restrictive conditions of confinement, such as "lockdown" for 23 hours a day and restrictive escort procedures for movements outside the ADMAX SHU. *Id.* at 112.

Iqbal alleges that he was housed in the ADMAX SHU from January 8, 2002, until he was released into the MDC's general population six months later in July 2002. Compl. ¶¶ 9, 81; App. 157a, 169a. Among other things, he claims that while in the ADMAX SHU he was subjected to a variety of abuses that purportedly violated a number of his constitutional and statutory rights. Among the various individuals Iqbal sued was respondent Hasty, then the warden of the MDC. Each allegation regarding Hasty's "personal involvement," as with most other supervisors sued, consists of nothing more than boilerplate language such as Hasty "knew or should have known" about some alleged constitutional or statutory violation without any specific factual allegations. *See, e.g., id.* at ¶¶ 124-25; App. 177-78a.

SUMMARY OF ARGUMENT

This case involves the intersection of two important areas of federal civil litigation and this Court's jurisprudence: pleading standards and the qualified immunity doctrine. The core issue here is whether a plaintiff can overcome a federal supervisory official's entitlement to qualified immunity at the pleadings stage with a complaint void of any factual allegations asserting the supervisory official's involvement in the alleged constitutional violations, but relies entirely on mere conclusions and labels to assert his or her involvement.

The Second Circuit held that Iqbal's boilerplate allegations concerning the personal involvement of numerous federal supervisory officials, including Hasty, were sufficient to defeat qualified immunity and allow the case to proceed to discovery. The decision, however, is contrary to both this Court's well

established guidance on qualified immunity, *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Crawford-El v. Britton*, 523 U.S. 574 (1998), and the Court's more recent guidance in *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), concerning the standard for assessing whether a complaint sufficiently satisfies the pleading standard under Rule 8 of the Federal Rules of Civil Procedure. The Second Circuit itself recognized the inherent tension in its ruling, given the intersecting principles of qualified immunity, the *Twombly* decision, and Rule 8. Yet the Second Circuit denied qualified immunity and permitted the case to survive as to those federal supervisory officials who had appealed, despite the absence of any alleged facts demonstrating Iqbal's entitlement to relief against the supervisory officials. That decision was incorrect and should be reversed.

Because the fundamental flaw of the Second Circuit's ruling is that it essentially ignored the very essence of Rule 8, particularly as explained in *Twombly* – *i.e.,* that a pleading must put forth facts that plausibly demonstrate that a claimant is entitled to relief – resolution of the questions posed by petitioners Ashcroft and Mueller here should not be limited only to cabinet officers or other "high-level" agency heads. Rather, the result should be applicable to any federal supervisory official who exercises significant discretionary responsibilities – such as the warden of a large correctional facility housing hundreds of inmates and detainees. In other words, it should be a generally applicable rule of pleading that claimants proceeding against federal supervisory officials in their individual capacity must supply some level of factual allegations demonstrating the

supervisory officials' involvement and cannot simply rely on conclusory labels.

Relatedly, as petitioners Ashcroft and Mueller urge, this Court should reverse the Second Circuit's acceptance of a constructive knowledge theory of liability that permits claims against supervisory officials based on their alleged gross negligence in supervising alleged lower-level perpetrators. Such a standard violates prior guidance from this Court – including *Rizzo v. Goode*, 423 U.S. 362 (1976) – in that it fails to premise liability on causal connections between affirmative conduct of supervisory officials and the harm alleged, allowing a supervisor to be held liable without any actual knowledge of the acts giving rise to a claim. A qualified immunity motion should not be defeated merely because a plaintiff alleges, without facts, that due to the defendant's supervisory position he or she "knew or should have known" of the alleged unconstitutional actions of subordinates.

ARGUMENT

I. A *BIVENS* PLAINTIFF SHOULD NOT BE ABLE TO DEFEAT A FEDERAL SUPERVISORY OFFICIAL'S CLAIM TO QUALIFIED IMMUNITY BASED ON CONCLUSORY ALLEGATIONS. RATHER, THE PLAINTIFF MUST ASSERT SPECIFIC FACTS DEMONSTRATING THE OFFICIAL'S INVOLVEMENT IN THE ALLEGED VIOLATIONS.

A. This Court Has Long Sought To Preserve a Federal Official's Right to Qualified Immunity By Fashioning Special Rules Applicable to *Bivens* Cases Intended to Resolve Meritless Cases At the Earliest Possible Stage In Litigation.

Iqbal's Complaint alleges a right to civil damages under this Court's *Bivens*[1] jurisprudence against a large number of federal officials, ranging from the lowest-level correctional officers to those at the highest level of the Executive Branch. While this Court has recognized an individual's right to bring certain civil constitutional claims against federal officials in their individual capacity, it has set definite boundaries to contain them, repeatedly expressing concern about the considerable burden and distraction *Bivens* cases pose to government officials attempting to perform their official responsibilities. *See, e.g., Harlow*, 457 U.S. at 816-18; *Crawford-El*, 523 U.S. at 584-85; *Mitchell*, 472 U.S. at 526. Hence, this Court has carefully constructed the qualified

[1] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

immunity doctrine, which ensures the proper "balance between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quotation omitted); *see also Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("the qualified immunity doctrine embodies special federal policy concerns related to the imposition of damages liability upon persons holding public office . . .").

The "essence" of qualified immunity is its possessor's "entitlement not to have to stand trial or face the other burdens of litigation," *Mitchell,* 472 U.S. at 526, including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow,* 457 U.S. at 817; *Anderson*, 483 U.S. at 646, n.6. In constructing the boundaries of qualified immunity, therefore, this Court has long recognized that courts must protect federal officials from unwarranted claims with a vigorous application of qualified immunity "at the *earliest possible stage* in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (emphasis added); *see also Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769, 1774, n.2 (2007); *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). Indeed, because qualified immunity is "*an immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell*, 472 U.S. at 526 (emphasis in original); *see also Siegert v. Gilley*, 500 U.S. 226, 233 (1991).

Acknowledging the critical policy objectives behind this unique defense to civil claims, this Court has excepted established civil procedures to bestow special rights on defendants in *Bivens* cases. For example, in *Mitchell*, 472 U.S. 511, 530, and as later

reaffirmed in *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996), this Court held that – unlike defendants in an ordinary civil action – government officials are entitled to an immediate interlocutory appeal of a federal district court's denial of a qualified immunity motion as a matter of law (a rule that permitted this Court's jurisdiction over the instant petition). Similarly, discovery is often stayed or limited while the immunity question is resolved, or after initial dispositive motions are properly defeated, discovery is narrowly tailored to issues relating to the defendant's entitlement to qualified immunity. *See Anderson*, 483 U.S. at 646 n.6; *Mitchell*, 472 U.S. at 526.

Because frivolous suits are a prevalent occurrence and present a particular concern in the *Bivens* context, disposing of unmeritorious cases at the pleading stage is essential to the preservation of qualified immunity. *See Crawford-El*, 523 U.S. at 590 ("there is a strong public interest in protecting public officials from the costs associated with the defense of damages actions. That interest is best served by a defense that permits insubstantial lawsuits to be quickly terminated."). This Court has previously recognized the potential conflict between qualified immunity and liberal pleading rules, and has therefore sought to protect government officials from baseless suits by requiring plaintiffs to "put forward specific, nonconclusory factual allegations." *Id.* at 598 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in judgment)). This requirement enables courts to "weed out" cases lacking merit from those with potential merit, which preserves the critical balance this Court has established in decades of *Bivens* jurisprudence. *Id*. at 593, 598; *see also Anderson*, 483 U.S. at 640 n.2 (emphasizing "that 'insubstantial claims' against government officials [should] be re-

solved *prior* to discovery") (emphasis added) (quoting *Harlow*, 457 U.S. at 818).

Nowhere is the problem of allowing baseless *Bivens* suits to proceed to discovery, and possibly trial, more apparent than in this case. Iqbal seeks to impute liability to various supervisory officials – including those at the highest levels of government – for alleged violations occurring in connection with the U.S. Government's response to the deadliest attack ever committed on U.S. soil. Iqbal's claims use the tool of individual liability suits to attack the validity of the federal government's decisions in handling emergency situations affecting this country's national security. Yet there is an obvious "national interest in enabling Cabinet officers . . . to perform their sensitive duties with decisiveness and without potentially ruinous hesitation." *Mitchell*, 472 U.S. at 541 (Stevens, J., concurring in judgment).

This concern runs to all supervisory officials, including to Hasty, the warden of a large detention facility. Indeed, although this Court has granted only Ashcroft and Mueller's petition for a writ of certiorari, it should deem the preservation of Hasty's entitlement to qualified immunity of no less import. While Hasty did not have the lofty level of authority that petitioners possessed, he stood in a position that is more visible day-to-day to potential claimants – *i.e.*, prisoners – and this visibility provides a fertile ground for Hasty to be subjected to baseless lawsuits.[2] Thus, to the extent this Court holds that

[2] Indeed, our government has long been concerned with the problems of burdensome and frivolous prisoner lawsuits. *See, e.g., Woodford v. Ngo*, 548 U.S. 81, 117 (2006) ("The competing values that Congress sought to effectuate by enacting the [Prison Litigation Reform Act] were reducing the number of

petitioners are entitled to qualified immunity here, it should fashion a rule that protects warden Hasty as well. Otherwise, the Court is opening the door for all inmates or detainees to sue their wardens individually simply by throwing conclusory catch-phrases into their complaints about their warden being complicit in alleged violations of low-ranking prison officers. Not only could this result interfere with a warden's ability to manage an institution, but it could run afoul of another "social cost" of *Bivens* action – "the deterrence of able citizens from acceptance of public office." *See Crawford-El*, 523 U.S. at 590 n.12 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)). Although the fear of being subjected to the burdens of litigation might or might not deter one from taking a high-ranking Cabinet office position, it is certainly a harsh reality of accepting public office for wardens such as Hasty.

The questions presented in this appeal, therefore, represent the next natural progression of this Court's chain of jurisprudence seeking to preserve the integrity of the qualified immunity doctrine. Demanding specific factual allegations from plaintiffs to avoid a claim of qualified immunity filed by supervisory officials will, as this Court recognized in *Crawford-El*, best serve this interest. *See Crawford-El*, 523 U.S. at

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frivolous filings, on one hand, while preserving prisoners' capacity to file meritorious claims."); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 365 (7th Cir. 1983) ("Much has recently been said and written about the proliferation of frivolous lawsuits filed by state and federal prisoners."). Moreover, a cursory review of the federal case dockets in New York reveals that in the less than five years that Hasty served as warden of the MDC and another institution in New York City, he was named as a defendant in almost 100 civil actions.

598; *Anderson*, 483 U.S. at 640 n.2; *Harlow,* 457 U.S. at 818.

B. *Twombly* Requires That A Complaint Allege Facts, Not Legal Conclusions, Demonstrating That The Plaintiff's Claim For Relief Is Plausible.

Last term, this Court affirmed the long-standing principle that a plaintiff needs to allege facts demonstrating a right to relief in a different yet analogous context. In *Bell Atl. Corp. v. Twombly*, ___ U.S. ___, 127 S. Ct. 1955 (2007), this Court considered the application of Rule 8(a)(2) of the Federal Rules of Civil Procedure in the context of an antitrust conspiracy case brought under Section 1 of the Sherman Act ("Section 1"), 15 U.S.C. § 1 (2008). The complaint in *Twombly* premised a Section 1 conspiracy claim on allegations that the defendants engaged in parallel conduct, which this Court observed were "consistent" with plaintiffs' theory for relief, but "without some further factual enhancement[,] it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* at 1966 (citing *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (1st Cir. 1999)).

Despite this flaw, the plaintiffs in *Twombly* argued that the complaint satisfied minimum notice pleading standard as stated in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," 127 S. Ct. at 1969, which was a formulation relied upon by lower federal courts for decades. *See, e.g., id.* at 1978 (Stevens, J., dissenting). In consid-

ering *Conley's* standard and the fifty years of jurisprudence and scholarly analysis that it generated, this Court rejected *Conley* as the applicable pleading standard under Rule 8. *Id.* at 1968-69. It observed that under a "literal" reading of the *Conley* formulation, a complaint could only be dismissed if its allegations render the claim for relief a "factual impossibility." *Id.* at 1968. Hence, the Court "retire[d]" the *Conley* standard, determining that Rule 8(a)(2) requires more. *See id.* at 1968-69.

In *Conley's* place, this Court held that Rule 8(a)(2)'s mandate establishes a "plausibility" standard for judging the adequacy of complaints. *Id.* at 1970. As explained by this Court, Rule 8(a)(2) requires a complaint to make a "showing" of a plaintiff's entitlement to relief, which must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Id.* at 1964 (quoting *Conley*, 355 U.S. at 47). To meet this burden, this Court found that a complaint must pass two threshold hurdles before discovery is allowed. First, while a complaint need not contain "detailed factual allegations, . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 1964-65 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Second, these factual allegations must "raise a right to relief above the speculative level" that crosses the line "between possibility and plausibility of 'entitl[ement] to relief.'" *Id.* at 1965-66. In other words, to "enter the realm of plausible liability," this Court determined that allegations in a complaint must cross the "border" between both "the conclusory and the factual . . .[and] the factually neutral and the factually suggestive." *Id.* at 1966 n.5. In reaching

this interpretation of Rule 8, this Court repeatedly affirmed that it was not applying a "'heightened' pleading standard." *Id.* at 1973 n.14.

This Court's holding in *Twombly* was guided in part by concerns that discovery in antitrust cases is often burdensome and costly, which – similar to *Bivens* cases – opens the door to abuses by plaintiffs. *Id.* at 1967. Thus, it observed that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' . . . ." *Id.* at 1967 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). In applying this standard, this Court rejected the plaintiffs' reliance on allegations concerning the defendants' parallel conduct because, standing alone, these allegations were equally consistent with the conspiracy alleged as with independent conduct, and therefore failed to "plausibly suggest[]" that a Section 1 conspiracy existed. *Id.*

C. The Teachings Of *Twombly* Underscore The Need For Specific Factual Allegations In *Bivens* Complaints.

Read together, *Twombly* and this Court's qualified immunity jurisprudence make clear that a plaintiff must allege specific facts demonstrating a plausible right to relief against a defendant. Akin to the Court's admonitions concerning the potential for discovery abuse in complex antitrust cases, *see Twombly*, 127 S. Ct. at 1967, *Bivens* cases present an even greater danger: not simply to burden private interests, but to impinge on the essential functions of governance, including, as exists in this case, the fed-

eral government's ability to ensure the security of our nation, and its ability to find qualified individuals willing to assume these roles in government without fear of risking their financial futures on unfounded litigation. As the Tenth Circuit has rightly observed, *Bivens* cases – and their "analog" under 42 U.S.C. § 1983, *see Hartman v. Moore*, 547 U.S. 250, 255 n.2 (2006) – "pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants." *Robbins v. State of Okla.*, 519 F.3d 1242, 1249 (10th Cir. 2008) (quoting *Anderson*, 384 U.S. at 646 n.6)). And because *Twombly*'s plausibility standard "appropriately reflect[s] the special interest in resolving the affirmative defense of qualified immunity 'at the earliest possible stage of a litigation,'" it has "greater bite" in these cases. *Id.* Indeed, "[w]ithout allegations sufficient to make clear the 'grounds' on which the plaintiff is entitled to relief, *Twombly*, 127 S. Ct. at 1965 n.3, it would be impossible for the court to perform its function of determining, at an early stage in the litigation, whether the asserted claim is clearly established."[3] *Id.*; *see also Behrens*, 516 U.S. at 309 ("at [the pleading] stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'") (emphasis in original).

Hasty has repeatedly asserted that he has not advocated for a "heightened" pleading standard in this case. Rather, in light of the Court's qualified immunity jurisprudence and the more recent *Twombly*

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[3] Moreover, any doubt that *Twombly* applies in a *Bivens* case should be laid to rest by the fact that this Court cited *Twombly* in a subsequent decision when it considered the sufficiency of a complaint brought under 42 U.S.C. § 1983, in *Erickson v. Pardus*, ___ U.S. ___, 127 S. Ct. 2197, 2200 (2007).

decision, this Court should hold that a *Bivens* plaintiff must provide some factual specificity in a complaint as to each defendant to withstand a qualified immunity motion. Factual specificity in this context does not equate to a heightened pleading standard. Rather, it is entirely consistent with Rule 8 to require factual allegations – not labels and conclusions – demonstrating that the claimant is entitled to relief. *Twombly* affirms that conclusion.

Furthermore, this rule is particularly important when the defendants are supervisory officials who hold more sensitive positions in the government and the scope of their authority exposes them to a wide range of lawsuits. Plaintiffs such as Iqbal should be required to allege a plausible – and not simply possible – factual basis to demonstrate a *Bivens* plaintiff's right to relief against each particular defendant from whom he seeks relief. Without such a rule, *Bivens* plaintiffs will be able to bring civil claims against high-ranking federal officials with reckless abandon. *See Iqbal*, 490 F.3d at 179; App. 69-70a (Cabranes, J., concurring) ("it seems that little would prevent other plaintiffs claiming to be aggrieved by national security programs and policies of the federal government from following the blueprint laid out by this lawsuit . . .").

D. The Second Circuit Misapplied *Twombly's* Plausibility Standard.

Although the Second Circuit carefully considered the foregoing precedents of this Court, its analysis of the applicable pleading standard in *Bivens* cases was only half right. In considering what it deemed as "conflicting signals" in *Twombly,* the Court of Appeals rightly decided that the "essential message" of

Twombly is that courts should apply "a flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *See Iqbal*, 490 F.3d at 157-58 (2d Cir. 2007) (emphasis in original); App. 24-25a. In reaching this conclusion, the Second Circuit strained to adhere not only to *Twombly* but this Court's prior edicts concerning the application of qualified immunity. *See id.*

But the Second Circuit missed the mark in its application of the *Twombly* standard to the allegations in Iqbal's Complaint. Its ruling permits this case to proceed to discovery against Ashcroft, Mueller, Hasty, and other supervisory officials despite Iqbal's reliance on exactly the type of conclusory allegations decried in *Twombly* and *Crawford-El*. Petitioners' Brief amply demonstrates the fatal flaws in Iqbal's claims against these cabinet-level officials, and the same basic analysis of Iqbal's claims applies to Hasty as well. Iqbal's claims against Hasty are of the same conclusory nature as those against Ashcroft and Mueller, premised entirely on the hypothesis that these federal officials must have been involved in the harms allegedly committed against Iqbal due to their position in the chain of command of the Executive Branch.

For example, as to Iqbal's claim that Hasty and other supervisory officials were complicit in acts of excessive force committed by low-level correctional officers at the MDC, he simply alleges:

> The beatings of Iqbal by MDC staff were all pursuant to the customs and practices of the MDC. Such unlawful customs and practices were known or should have been known to

> Defendants Hasty [and four other supervisory officials at the MDC], who with deliberate indifference to and/or reckless disregard for the risk of failing to take remedial action, subsequently failed to institute, create, or enforce reasonable policies or procedures to curtail such unlawful activity.

Compl. ¶ 124; App. 177a. The Second Circuit held these allegations sufficient, finding that "[t]he plausibility standard requires no subsidiary facts at the pleading stage to support an allegation of Hasty's knowledge because it is at least plausible that a warden would know of mistreatment inflicted by those under his command." *Iqbal*, 490 F.3d at 170; App. 50a.

This holding, however, reflects a misunderstanding of *Twombly's* teachings. First, these allegations run afoul of the *Twombly* standard because they are nothing but a boilerplate recital of the operative legal standard for supervisory liability as established by the Second Circuit.[4] *See Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) ("[a] supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue."). Second, Iqbal's allegations as to Hasty fail adequately to suggest that he was involved in the violations at issue. The error in the Second Circuit's analysis here is best exemplified by its statement that "it is at least plausible" that Hasty would know of the acts at issue,

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[4] This error is even more pronounced due to the fact, as explained in Section II, *infra*, that the Second Circuit's standard for supervisory liability is too permissive in light of prior rulings of this Court.

Iqbal, 490 F.3d at 170; App. 50a, because this finding moves the minimum pleading standard back to the realm of possibility – *i.e.*, that Iqbal's claim is not a "factual impossibility." *See Twombly*, 127 S. Ct. at 1968. As Warden of the MDC, certainly it is *possible* or *conceivable* to believe Iqbal's claim that Hasty could have established customs or policies that led to the violations alleged, or that he could have known about the acts that occurred and failed to act on such knowledge. But *Twombly* requires more; it requires *plausibility*. And Iqbal fails to "identify[] any facts that are suggestive enough to render [this claim] plausible" as to Hasty.[5] *Id*. at 1965. Thus, the Second Circuit – despite its careful analysis of *Twombly* – transformed the plausibility standard back to *Conley's* more permissive standard that *Twombly* unequivocally rejected. If *Twombly's* standard is to have any meaning, Iqbal's claims should not be allowed to proceed to discovery.

The Second Circuit's approval of Iqbal's allegations concerning an alleged conspiracy under 42 U.S.C. § 1985(3) demonstrates an even more dramatic misapplication of *Twombly*. The Second Circuit deter-

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[5] Lower federal court decisions are replete with examples of facts that provide a plausible basis to hold supervisory officials liable for acts committed by their subordinates. For example, in *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255 (2d Cir. 2001), the plaintiff alleged specific facts that the supervisory defendants knew that the subordinate who directly committed the unconstitutional act had similarly acted on four prior occasions, and therefore "knowingly exposed" the plaintiff to an employee with a propensity to commit such acts. While decided before *Twombly*, this complaint likely would still pass *Twombly's* scrutiny because these allegations were both non-conclusory and plausibly suggested the supervisory official's culpability in the harms alleged by the plaintiff.

mined that it had "no doubt" that Iqbal's conspiracy allegations were sufficient because "we do not encounter here a bare allegation of conspiracy supported only by an allegation of conduct that is readily explained as individual action . . . ." 490 F.3d at 177; 65a. Like the complaint at issue in *Twombly*, however, Iqbal's conspiracy claim relies entirely on conclusory allegations that somehow the defendants came to an "agreement" to violate Iqbal's rights, and the Complaint fails to provide any meaningful facts that suggest that any such agreement existed. *See* Compl. ¶¶ 96, 247; App. 172a, 206a. The absence of any specifics as to the nature of this theorized conspiracy is directly analogous to *Twombly*, which explicitly held that "a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 127 S. Ct. at 1966. It is therefore puzzling how the Second Circuit could distinguish Iqbal's claim from that of *Twombly*, and the Second Circuit fails to explain which of Iqbal's allegations support its conclusion that there is "no doubt" that Iqbal has adequately stated a conspiracy claim. Indeed, a comparison between the conspiracy allegations in *Twombly* and those at issue here readily exposes their fatal flaw.

The same theme rings true for the remainder of Iqbal's claims against Hasty. A full review of Iqbal's 54-page, 270-paragraph Complaint fails to provide adequate grounds for finding Hasty complicit in any of the violations alleged. All of the Complaint's claims directed against Hasty contain similarly hollow assertions such as that Hasty established "customs and practices," that he "knew or should have known" of the violations alleged or the propensity of his subordinates to commit the violations alleged, or that he acted with "deliberate indifference and/or reckless

disregard." *See, e.g.,* Compl. ¶¶ 17, 57-58, 97, 108, 109, 124-25, 134, 142, 148-50, 150, 157, 160-61, 173-75, 195, 197; App. 158a, 165a, 173a, 175a, 177-78a, 180a, 182-85a, 187a, 190-91a. The conclusory nature of these allegations is further exposed by the fact that virtually all of Iqbal's boilerplate allegations that attempt to establish Hasty's personal involvement are lumped together with the alleged "actions" of other supervisory defendants, sometimes numbering as many as *eleven* defendants. *See, e.g.,* Compl. ¶ 96; App. 172a.[6]

In finding these allegations sufficient, the Second Circuit failed to apply properly the teachings of *Twombly* and this Court's qualified immunity jurisprudence, essentially finding that if Iqbal alleged Hasty wrongfully acted, qualified immunity must be denied. Yet on their face, each and every one of these allegations is wholly conclusory and unsupported by facts. Iqbal fails to allege *any* fact concerning the time, place, or manner of Hasty's personal involvement in the alleged violations. *See Twombly*, 127 S. Ct. at 1971 n.10. For example, Iqbal's series of "customs and practices" allegations fail to identify any such policy and practice with any specificity, or even to describe their purported content.[7]

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[6] Furthermore, this case is rare in that the events giving rise to Iqbal's claims have already been subject to an extensive investigation by the OIG that resulted in a detailed report of findings relevant to Iqbal's case. The OIG Report serves only to affirm the conclusion that Hasty was not involved in the events giving rise to Iqbal's claims. Despite its extensive findings, it did not make any findings that Hasty had any culpability in the types of abuses alleged by Iqbal.

[7] By contrast, Iqbal *does* make a specific factual allegation against Hasty's successor as Warden of the MDC, Michael Zenk,

Thus, a proper analysis of Iqbal's claims against Hasty – similar to the claims against the other high-ranking officials involved in this appeal – make clear that the supporting allegations are merely the fruit of assumptions and leaps of logic based on Hasty's position as warden at the MDC. However, assumptions of liability based on drawing a line up an alleged perpetrator's chain of command undermines a supervisory official's right to qualified immunity. Indeed, the doctrine of *respondeat superior* does not apply in a *Bivens* action, *see Monell v. Dept. of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978) (rejecting *respondeat superior* in the § 1983 context),[8] and Iqbal's attempt to circumvent this rule with boilerplate catchphrases should not survive the application of *Twombly's* plausibility standard.

Thus, if the fundamental principles of the qualified immunity doctrine are to be preserved, *Bivens* plaintiffs cannot be permitted to bring claims against federal officials by relying on baseless conclusory allegations of this type. This case is illustrative of this potential; the Second Circuit's decision permits Iqbal to reach to the highest levels of our federal government with the simple inclusion of a few magic words such as "created a custom or policy" and "knew or should have known of" certain acts but "failed to remedy them." The danger this creates – as the

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alleging that Zenk called Iqbal a "terrorist" to support Iqbal's allegation that Zenk acted with discriminatory animus against him. *See* Compl. ¶ 87; App. 170a.

[8] *See also Int'l Action Ctr. v. United States*, 365 F.3d 20, 27 (D.C. Cir. 2004) (Roberts, J.) (finding that *respondeat superior* is "clearly barred" under § 1983); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002) ("[a] supervisor may not be held liable . . . merely because his subordinate committed a constitutional tort").

Second Circuit itself noted – is that any enterprising plaintiff can employ similar logic to open an entire chain of command to liability for inappropriate acts of a low-level rogue officer. *See Iqbal*, 490 F.3d at 179; App. 69a (Cabranes, J., concurring). Because of the ease by which such allegations can be made, it would undermine the *immunity* component for all supervisory officials – exposing them to some level of discovery any time a plaintiff alleged that a subordinate officer violated the plaintiff's constitutional rights.

Nor does the fact that Hasty was located at the MDC and had a more direct supervisory authority over the alleged perpetrators render Iqbal's claims against Hasty any more plausible than Iqbal's claims against Ashcroft and Mueller. Potentially lost in the shuffle of Iqbal's various conclusory assertions against Hasty is the fact that the MDC is a massive institution, rising nine stories high and housing over 2,000 inmates at any given time. *See* OIG Report at 111, n.88. Thus, it cannot be plausible simply to assume that Hasty had knowledge of everything that occurred within the MDC's walls. Because *respondeat superior* is not applicable in *Bivens* cases, Iqbal – or any prisoner, for that matter – should not be allowed to do an "end-around" this rule. Instead, they should be required to establish a plausible basis to subject a warden to the burdens of civil litigation. If a bare allegation of *knowledge* satisfies the plausibility test, a warden would face personal liability for virtually *anything* that happens within his prison, regardless of any actual connection to the act giving rise to the claim. Certainly, if qualified immunity is to have any meaning for a prison warden, the Second Circuit's loose interpretation of the rules of civil pleading cannot stand.

In short, this case presents precisely the type of "artful pleading" that this Court warned against over 25 years ago in *Harlow*. 457 U.S. at 808. Accordingly, to give meaning to the jurisprudence established by this Court – from *Harlow*, to *Monell*, to *Crawford-El*, and leading up to *Twombly* – this Court must demand factual specificity in the allegations against Hasty and the other high-ranking federal officials named as defendants in Iqbal's Complaint before he should be allowed to test his claims in discovery.

II. CONSTRUCTIVE KNOWLEDGE IS NOT A PROPER BASIS FOR IMPUTING LIABILITY TO A SUPERVISORY OFFICIAL FOR THE ACTS OF HIS SUBORDINATES.

The second question presented in Ashcroft and Mueller's petition compels this Court to review the legal standard for "supervisory liability" in *Bivens* cases as established by the Second Circuit. The Second Circuit set forth its articulation of the standard as follows:

> The personal involvement of a supervisor may be established by showing that he (1) directly participated in the violation, (2) failed to remedy the violation after being informed of it by report or appeal, (3) created a policy or custom under which the violation occurred, (4) was grossly negligent in supervising subordinates who committed the violation, or (5) was deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated.

Iqbal, 490 F.3d at 152-53; App. 14a (citing *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995)). Bound to

follow this established precedent, the Second Circuit did not consider its propriety. But as the petitioners' brief demonstrates, this Court should reject this standard as too permissive. Specifically, the Second Circuit's acceptance of liability for a "grossly negligent" supervisor cannot be reconciled with prior decisions of this Court.

In *Rizzo v. Goode*, 423 U.S. 362, 371 (1976), this Court rejected the lower court's finding that supervisory officials were liable for violations committed by subordinate police officers because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by [the supervisory officials] express or otherwise showing their authorization or approval of such misconduct." The Court further determined that a "causal connection" between the defendants' "affirmative" conduct and the alleged harm was required to find liability under § 1983. *Id.* at 371, 377. Furthermore, this Court's decisions in the municipal liability and Eighth Amendment contexts reaffirmed this principle. *See Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997); *Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994).

The Second Circuit vitiates these requirements, however, by accepting a "grossly negligent" standard because it permits a *Bivens* plaintiff to bring a claim against a supervisory official who did nothing to cause the harm alleged, nor had any actual knowledge that such harm occurred. Other federal circuit courts, including the United States Court of Appeals for the District of Columbia in *International Action Center*, 365 F.3d at 28 – an opinion authored by then-Judge Roberts – have recognized the significance of *Rizzo* and have rejected the reliance on a theory

of negligent supervision. *See also Gossmeyer v. McDonald*, 128 F.3d 481, 495 (7th Cir. 1997); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1194 (3d Cir. 1995); *Woodward v. City of Worland*, 977 F.2d 1392, 1400 (10th Cir. 1992).

The flaw in the Second Circuit's approach – like the failure in Iqbal's pleadings – is amplified by the need to preserve the qualified immunity of supervisory officials. Allowing cases to go forward based on a constructive notice theory exposes high-ranking officials to untold numbers of *Bivens* suits because potential claimants can drag these officials into their lawsuits on speculative theories that mere negligence can be proved. As to Hasty, who managed a large prison institution, the possibilities of lawsuits based on this theory brought by the thousands of inmates that were under his authority – for the acts of any number of subordinates of which he was entirely unaware – further supports the rejection of this avenue of liability.

Thus, as more fully explained by petitioners Ashcroft and Mueller, this Court should reject the Second Circuit's use of a constructive notice standard in *Bivens* cases.

CONCLUSION

This Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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